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The Value of the Comparative and the International in Reflecting on State Responses to the War on Terror

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War on Terror Symposium Foreword*

The Value of the Comparative and the International in Reflecting on State Responses to the War on Terror

Since the tumultuous events of September 11, 2001, national and international legal systems have struggled to keep pace with the scale and depth of state responses to the transnational "war on terror." Legal responses to that day, allied with the subsequent threats emanating from al Qaeda and related terrorist networks have resulted in a plethora of legal reactions that are legislative, judicial and administrative in form. At the domestic level, responses include the passage of special "emergency" legislation; the expanded use of executive powers; the activation of special courts to process suspected terrorist suspects; the invocation of new standards and guidelines modifying the legality of using coercive interrogation methods; revised standards on the surveillance of persons suspected of terrorist activity; and a greater degree of overlap between previously stratified domestic and foreign affairs' powers. International legal responses have not lagged far behind. States have moved to speed up their multi-lateral treaty agreements; signing and ratifying a large number of Suppression Conventions; agreement on a multi-lateral Terrorism Convention has advanced; the UN Security Council passed Resolution 1373 requiring states to legislate and report on their actions to suppress and criminalize terrorist actions

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and actors; and regional bodies such as the European Union have enforced framework decisions on states requiring them to take domestic legal action aimed at terrorist actors and actions based on the regional political consensus. All this activity is open to a number of interpretations. It suggests the centrality of law in the response to terrorism. It affirms the substantial interface and overlap between legal measures taken at the domestic level and those being activated internationally. It affirms the scale and breadth of legal responses – with corresponding concerns that arise about the effects on the integrity of law, the protection of liberties, and the efficacy of the measures taken.

The themes taken up in the symposium are framed by the scale and breadth of legal responses to the war on terror. Uniquely however this conference sought to eschew the intellectual straightjacket of reflecting on the "war on terror" within a legal frame only. A key impetus for the conference and this symposium was to accept that law (both national and international) played a critical role in shaping state and institutional responses to the war on terror, but to probe and challenge the primacy of law and the efficacy of legal terms of reference alone as a means to respond to the challenge of terrorism in the 21st century. In particular, the symposium contributions reflect considered and thoughtful deliberation on the ways in which interdisciplinary collaborations and sustained conversations can ultimately prove a fruitful pool of knowledge when framing responses to the challenges posed by terrorism. In this way future legal proposals or the measurement of success for prior measures engages a wider frame of reference – optimizing, we believe, the capacity of law to offer solutions that engage wide expertise as well as benchmarking legal success against a variety of social and political criteria.

We stress two important pedagogical aspects of interdisciplinary analysis. The first is that inter-disciplinary analysis can successfully be integrated into and augment the vibrancy to be derived from legal analysis offered by legal scholars. Here, for example, Campbell and Connelly's contribution is instructive.[1] They advance the thesis that "the simplistic structure of dominant anti-terrorist legal discourse obscures the complexity of law's role in the interactions of the

1. Colm Campbell & Ita Connolly, *A Deadly Complexity: Law, Social Movements and Political Violence*, 16 MINN. J. INT'L L. 265 (2007).

state and its violent challengers."[2] Their analysis is informed and strengthened by the use of a unique interview-based and qualitative data set involving non-state actors who were party to the conflict violence in Northern Ireland. In parallel, their conceptualization is buttressed by drawing on established work on legal mobilization, supplemented by social movement theory on the mobilization of violent groups.[3] This provides the backdrop to a compelling legal analysis of the way in which social movement theory can actively inform our understanding of the legal responses to collective violence. As such it poses a critical challenge to those who assert that more repressive legal measures are the means to counteract terrorist violence.[4]

The second aspect to this inter-disciplinary focus is to bring to the center of legal conversations those theorists and scholars working at the core of their own disciplines with overlapping mandates of intellectual interest. To that end, this symposium issue brings two leading political scientists to the conversation, and demonstrates the texture, depth and richness to be derived by legal audiences and policy makers from reflective thinking about these parallel disciplinary inquiries. Christian Davenport's article *Licensing Repression* is a weighty and compelling expose of the manner in which the United States has cyclically engaged in patterns of repression targeted at groups and individuals perceived to threaten the elite status quo.[5] Davenport identifies a compelling aspect of state response to perceived internal dissent, namely the practices of states to pre-empt dissent using "repression . . . as a proactive mechanism of control,"[6] and the state tendency to use disproportionate repression to the challenges they are confronted with. Davenport persuasively argues that "these alternative conceptions of threat and state action represent very different perspectives on political repressive action."[7] The article makes compelling linkages with the contemporary moment and allows for reflective pause as we internalize the consequences on the

2. *Id.* at 265.

3. *Id.* at 268, 270–81.

4. See also BRENDAN O LEARY (WITH MARIANNE HEIBERG & JOHN TIRMAN EDS) TERROR INSURGENCY AND THE STATE (2007) (forthcoming). Professor O Leary presented the findings from the book at the conference (Panel IV, Peace and Exit Strategies).

5. Christian Davenport, *Licensing Repression: Dissent, Threats and State Repression in the United States*, 16 MINN. J. INT'L L. 311 (2007).

6. *Id.* at 313.

7. *Id.*

body politic as well as on the targeted groups of these repressive experiences. Once again, the conclusions drawn from such analysis are strengthened by empirical analysis underpinning the scholarly reflections.[8] Ian Lustick's contribution is a challenging analysis – pithily and forcefully revealing the weakness of the political claims which advance the existence of a "war on terror."[9] This analysis critically challenges the very notion that the "war on terror" exists, revealing it as little more than a convenient construct useful to a self-interested military-civilian elite and advancing imperialist claims by the hegemonic state under the guise of universal threat. Specifically Lustick declares that the "war on terror" was and remains a necessary construct to justify the Iraq war – that the former was a necessary pre-condition to the activation of the latter.[10] The claims made by Lustick bolster the assertions made by legal theorists who have challenged the legality and legitimacy of the "war on terror" through doctrinal and textual analysis.[11] A concluding aspect of this interdisciplinary approach is the elevation and mainstreaming it facilitates for empirical research work. While socio-legal analysis has a strong domestic law tradition in many countries, its application to international and comparative legal issues is less developed. One of the achievements of this symposium is to demonstrate how that tradition of socio-legal scholarship can be harnessed to international and comparative legal analysis producing unique scholarly insights.

A second valuable contribution of this symposium is to

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8. Davenport presents data produced from a statistical analysis of U.S. state coercion between 1948 and 1982 finding that 1) political threats matter consistently outweighing the influence of behavioral threats and (2) the influence of political threat varies according to the magnitude of the threat established at the time. *See Id.*

9. Ian S. Lustick, *Fractured Fairy Tales: The War on Terror and the Emperor's New Clothes*, 16 MINN. J. INT'L L. 335 (2007). He notes *inter alia* that the war on terror has consumed political public speeches, media perceptions and public perceptions of their own safety and risk. *See id.*

10. *See id.*

11. See e.g. OREN GROSS AND FIONNUALA NÍ AOLÁIN LAW IN TIMES OF CRISIS EMERGENCY POWERS IN THEORY AND PRACTICE 365-421(2006); Hans-Peter Gasser, Acts of Terror, *"Terrorism" and International Humanitarian Law* 84 INTERNATIONAL REVIEW OF THE RED CROSS 547 (2002); Thomas M. Franck, *Criminals, Combatants or What? An Examination of the Role of Law in Responding to the Threat of Terror* 98 AM. J. INT'L. L. 686 (2004); Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights* 14 EUR. J. INT'L. L. 241 (2003); DOMINICK MCGOLDRICK, FROM "9/11" TO THE "IRAQ WAR 2003" INTERNATIONAL LAW IN AN AGE OF COMPLEXITY (2004).

stress the pertinence of comparative and international reference points as we evaluate domestic legal responses to the "war on terror." In this context, it is particularly fitting that this conference was the joint enterprise of a leading research institute located in a post-conflict society and a leading US law school with a long tradition of contributing to international and domestic debates on human rights. In the myopic domestic responses to the events of 9/11 there has been a pronounced tendency for scholars and policy-makers to avoid reflecting upon and eschewing the lessons that can be learnt from the experiences of other jurisdictions with vast experience of responding to the multifaceted phenomena of terrorism. Two articles in this symposium draw out this national/international interface. Shane Darcy's timely assessment of the United Kingdom's responses to the "war on terror," and in particular the vigorous oversight of the United Kingdom's courts is an important comparative contribution.[12] The article gives a nuanced overview of the manner in which the conflict in Iraq has highlighted "[s]ome of the profound challenges that are presented by the application of human rights law during armed conflict and how much remains to be done to resolve the complex inter-relationship between international humanitarian law and human rights."[13] It has particular relevance to the contemporary moment in the United States as the judicial branch faces a continuous stream of legal challenges to the measures taken by the Bush Administration across a range of issues.[14] Another important contribution to this domestic / international interchange is the article by David Weissbrodt and Amy Bergquist examining the controversial practice of extraordinary rendition, which has been expanded by the United States to "encompass the abduction of terror suspects not in order to bring them to justice in the United States, but rather to send them to a third country."[15] Following careful

12. Shane Darcy, *Human Rights Protection during the "War on Terror": Two Steps Back, One Step Forward*, 16 MINN. J. INT'L L. 353 (2007).

13. *Id.* at 354.

14. For outstanding cases winding their way through the Federal Courts *see e.g.* U.S. v. Kandasamy (U.S. District Court District of Columbia); U,S. v Maldonado, (U.S. S District Court Southern District of Texas); U.S. v. Chiquita Brands International Inc (US District Court District of Columbia); US v. Alishtari (U.S. District Court, Southern District of New York); U.S. V Ibague (U.S. District Court District of Columbia); U.S. v. Osman et al (U.S. District of Maryland; U.S. v Sivasubramaniam (U.S. District Court Western District of Washington).

15. David Weissbrodt & Amy Bergquist, *Methods of the "War on Terror"*, 16 MINN. J. INT'L L. 371 (2007).

assessment of the governing international treaty provisions contained in human rights and humanitarian law treaties the authors review domestic legislative provisions (namely the Habeas Corpus and Military Commissions Act 2006) assessing the significance of the powers sought in both contexts. The article underscores the symbiotic relationship between the local and the global in the "war on terror" and the significance of playing close attention to the nexus and relationship between domestic and international legal fronts.

We also underscore the importance of reflection by leading scholars on the international legal dimensions of state responses to the "war on terror."[16] Some of these issues result directly from the use of international legal measures (and validation processes) for activating state military and legal responses to the actions of and threats posed by transnational state actors. Highly visible in this regard has been the use of force by states, and debates around the extent to which the use of force by the United States and its coalition partners in Afghanistan and Iraq have led to weakening or watering down of international norms.[17] David Wippman's erudite article provides a robust defence of the health of international legal norms, and in particular of the meta-norm: Article 2(4) of the United Nations Charter.[18] He argues that "[I]n fact, Article 2(4) has displayed remarkable resilience; it not only stubbornly refuses to die, but sometimes emerges stronger than before."[19] His optimistic assessment is a valuable rejoinder to the nay-sayers who have written off the capacity of international legal norms to withstand the assault or manipulation of their content and boundaries. The article also provides an important index to the vigor of domestic norms by allowing us to envision that the health of international legal norms will have a positive influence on the ability of domestic legal norms to 'bounce-back' from exceptionality.

The symposium continues to address the critical subject of

16. Included here also was the presentation by Professor Oren Gross whose symposium contribution examined the merits and extension of the doctrine of humanitarian intervention [Panel I: International Law and the Use of Force in the 21st Century].

17. Critical here are the interpretation of the legitimacy and authorization provided by key United Nations Security Council Resolutions such as United Nations Security Council Resolution 1441 passed November 8, 2002.

18. David Wippman, *The Nine Lives of Article 2(4)*, 16 MINN. J. INT'L L. 387 (2007).

19. *Id.* at 390.

the use of force in two further contributions. Achilles Skordas presents an analytically rigorous challenge to the way in which scholars have generally conceptualized the law and politics of military intervention.[20] He asserts that "[t]he international community confers legitimacy upon the hegemonic use of force, even if the intervention is *prima facie* illegal under international law."[21] Notably by examining controversial and recent interventions in Kosovo, Afghanistan, Iraq and Lebanon he underscores his assertion that hegemonic intervention is a constituent element of "global society's overall violent communication cycle."[22] Notably this analysis is multi-disciplinary in its foundations and its theoretical backdrop, drawing particularly on systems-theoretical perspectives which affirms the dept of the intellectual interchange which scholars to this symposium are engaged in.

This breadth of reflection and influences is also manifest in the contribution of E. Thomas Sullivan, whose article *The Doctrine of Proportionality in a Time of War* is framed by the critical question of thinking about "why and how we go to war."[23] By giving much needed attention to the Just War doctrine in the context of contemporary military engagements Sullivan reinvigorates our sensibilities about the importance of utilizing legal and political doctrines with established and well-worn pedigrees to inform decision-making in the contemporary moment. This historical understanding combined with reflective internalization of the values inherent in the just war doctrine potentially give us pause and a braking mechanism to state reflexes when faced with threats.

A defining feature of this symposium is the importance placed on theoretical framing to the broader conclusions scholars draw about the legitimacy, conduct and efficacy of the "war on terror." Importantly this theoretical reflection is not closeted in an impenetrable ivory tower, but provides an important praxis with the weighty policy issues that continue to drive state response to the "war on terror." This praxis of scholarship with "real life" demands underscores that insightful theory provides the means to avoid "silo-like" thinking.

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20. Achilles Skordas, *Hegemonic Intervention as Legitimate Use of Force*, 16 MINN. J. INT'L L. 407 (2007).

21. *Id.*

22. *Id.*

23. E. Thomas Sullivan, *The Doctrine of Proportionality in a Time of War*, 16 MINN. J. INT'L L. 457 (2007).

Specifically, avoiding thinking and solutions that is inward looking, unresponsive, and are inhibited by the particular bias and narrowness that can drive narrow disciplinary focus. It allows international and comparative scholars to provide dynamic ways of assessing the problems that confront lawmakers, by re-positing the problems and the solutions offered and allowing us to view them in a startlingly different way. A number of contributions highlight this innovative tactic. For example, David Kennedy's persuasive revisionist approach to the role, functionality and culture of the military is an important reminder of the significance of systems (both macro and micro) to the absorption and entrenchment of legal responses.[24] His article also underscores the connection between law and modern warfare, and the manner in which law has become the tool justifying (and shaping) political choices and extreme violence. Given the elevation of military culture and elites in the post 9/11 world, grounding of this article confirms and extends the scholarly interpretation.

The Minnesota Center for Legal Studies and the Transitional Justice Institute were very pleased to co-sponsor the conference which led to the articles brought together in this very impressive volume of the Minnesota Journal of International Law. Both Center and Institute underscore the value of trans-Atlantic conversations, and the importance of bringing European and American perspectives to bear on the issues that confront western democracies in the aftermath of events in New York, London and Madrid. Both Center and Institute are convinced that the substance of legal conversations concerning the direction and management of the threats posed by terrorism can best be advanced by an inter-disciplinary approach and by ensuring that legal scholars listen to and learn from their colleagues working on these concerns from a different pedagogical starting point. Both the Center and Institute further affirm the value of comparative and international perspectives on the "war on terror." The vibrancy of such conversations is testament to the capacity of combined approaches to offer meaningful responses to and reflection on the contemporary "war on terror."

24. David Kennedy, *Modern War and Modern Law*, 16 MINN. J. INT'L L. 471 (2007).